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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEE LAMB,

Defendant and Appellant.

D051786

(Super. Ct. No. SCD186673)

APPEAL from a judgment of the Superior Court of San Diego County, Browder Willis, Judge. Affirmed.

I.

INTRODUCTION

A jury found Michael Lee Lamb guilty of two counts of burglary (Pen. Code, § 459)<sup>1</sup> (counts 1 and 2). In addition, with respect to each count, the jury found that the burglary was of an inhabited dwelling. (§ 460.) After the jury returned its verdicts on the

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<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

burglary charges, Lamb waived his right to a jury, and admitted having suffered various prior convictions. The trial court sentenced Lamb to a total term of 60 years in prison, consisting of two consecutive terms of 25-years-to-life on counts 1 and 2, pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 668, 1170.12), and two consecutive five-year terms for two prior serious felony enhancements (§§ 667, subd. (a)(1), 668).

On appeal, Lamb claims that the trial court violated his constitutional right to present a defense by limiting a defense expert witness's testimony regarding Lamb's use of alcohol near the time of the charged offenses. Lamb also claims that the trial court erred in modifying a jury instruction concerning voluntary intoxication. We affirm the judgment.

## II.

### FACTUAL BACKGROUND

#### A. *The People's evidence*

##### 1. *The April 30, 2004 burglary*

On April 30, 2004, Lamb broke a bedroom window at a house on Cushman Avenue in San Diego. Lamb cut himself as he entered the home through the window and bled on various surfaces throughout the home, including on the kitchen floor, a kitchen counter, and the sink of the upstairs bathroom. Lamb took a pair of tennis shoes, a burgundy sports coat, a small stereo, and some tools, and left a pair of old shoes in the house. Police collected blood samples in the house, which were later determined to contain Lamb's DNA.

2. *The May 11, 2004 burglary*

At approximately 12:35 p.m. on May 11, 2004, Christopher Packer observed Lamb using a large metal plate to attempt to break a door to a condominium. The door was made of glass and metal. Packer went to the front of the condominium complex and alerted a security guard. The guard called San Diego Police.

While waiting for police to arrive, a second security guard, Leeta Obermuller, went to the front door of the condominium and waited outside the door. After a few minutes, Lamb came out of the condominium holding a tan container that had a stamp collection in it. Lamb was wearing a red baseball cap and a denim jacket that he had taken from the condominium. Obermuller told Lamb that she was a security guard and asked him to sit down. Lamb complied. Police arrived minutes later and arrested Lamb. Both Obermuller and the arresting officers testified that Lamb did not appear to be intoxicated at the time of his arrest. The owner of the condominium, Ronald Knight, testified that the stamps were valued at approximately \$4,000 to \$5,000.

B. *The defense*

Lamb testified on his own behalf. He stated that he drank large amounts of alcohol on a daily basis during the time period in which the charged offenses were alleged to have occurred. Lamb further testified that he did not recall committing either of the charged offenses. Dr. Judith Meyers testified that alcohol-blackout syndrome impairs a person's memory, and that it is caused by the rapid intake of alcohol.

### III.

#### DISCUSSION

##### A. *Lamb timely filed his appeal*

The People claim that Lamb's appeal must be dismissed because he filed his notice of appeal one day past the 60-day statutory period.

Pursuant to California Rules of Court, rule 8.308(a), a criminal defendant generally must file his notice of appeal within 60 days of rendition of judgment. However, California Rules of Court, rule 8.308(e) provides the following exception to the ordinary time with which a notice of appeal must be filed: "If the superior court clerk receives a notice of appeal by mail from a custodial institution after the period specified in (a) has expired but the envelope shows that the notice was mailed or delivered to custodial officials for mailing within the period specified in (a), the notice is deemed timely. The clerk must retain in the case file the envelope in which the notice was received." This provision implements the so-called "prison-delivery rule," under which "a prisoner's notice of appeal is deemed timely filed if delivered to prison authorities within the 60-day filing period set forth in . . . the California Rules of Court." (*In re Jordan* (1992) 4 Cal.4th 116, 118-119.)

In this case, the trial court rendered judgment when it sentenced Lamb on August 2, 2007. The superior court clerk received Lamb's notice of appeal 61 days later, on October 2, 2007. However, the record contains an envelope from a custodial institution

that reflects that the notice of appeal was mailed on August 20, 2007, well within the 60-day period. Accordingly, we conclude that Lamb timely filed his appeal.

B. *The trial court did not violate Lamb's constitutional right to present a defense by limiting a defense expert witness's testimony regarding Lamb's use of alcohol near the time of the charged offenses*

Lamb claims that the trial court violated his constitutional right to present a defense by limiting a defense expert witness's testimony regarding Lamb's use of alcohol near the time of the charged offenses. Lamb contends that the trial court erred by precluding the expert from testifying that Lamb is an alcoholic and that it was likely that he suffered from alcohol-induced blackouts near the time of the charged offenses. Lamb also claims that the court erred in precluding the expert from basing her testimony on the expert's evaluation of Lamb, two medical reports relevant to Lamb's use of alcohol, and Lamb's trial testimony.

We apply the abuse of discretion standard of review to Lamb's claim that the trial court erred in limiting the scope of the proffered expert testimony. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 83-84.) We assume for purposes of this decision that the de novo standard of review applies in determining whether the trial court's limitation of the expert's testimony was so extensive so as to violate Lamb's constitutional right to present a defense. (*People v. Seijas* (2005) 36 Cal.4th 291, 304 [stating independent review standard of review "'comports with this court's usual practice for review of mixed question determinations affecting constitutional rights'"], quoting *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

1. *Factual and procedural background*

a. *Proceedings concerning the admissibility of the proffered expert testimony*

During the trial, at a hearing outside the presence of the jury, defense counsel indicated to the court that he was considering presenting the testimony of an expert regarding alcohol-induced blackout syndrome. Defense counsel also noted that he was in possession of a medical record that indicated that Lamb was taken to the hospital after his arrest on May 11, 2004. Although Lamb's blood alcohol level was not tested on that date, the medical record indicated that Lamb smelled of alcohol when he arrived at the hospital. Defense counsel also stated that he was in possession of a second medical record, dated May 6, 2004, that indicated that Lamb had gone to the hospital on that date for treatment of various wounds on his arms. The May 6 record also stated that Lamb had 283 milligrams of alcohol in his blood.

Although defense counsel did not expressly state that he wanted to offer the records in evidence, the prosecutor remarked that there was no exception to the hearsay rule that would permit the defense to do so. In addition, the prosecutor objected to the proffered expert testimony on the ground that the defense had not previously provided the prosecution with any information regarding the proposed testimony.

The court stated that the records were hearsay and asked defense counsel how he intended to present statements from the records to the jury. Defense counsel did not dispute that the medical records were hearsay, but suggested that he might call Lamb's

treating doctor as a witness.<sup>2</sup> Defense counsel also asserted that the expert could rely on the medical reports as a basis for her testimony.

As to the proffered expert testimony, defense counsel explained that the expert had previously examined Lamb in the context of competency proceedings prior to the trial. Counsel stated, however, "I [do not] want to go into [the expert's] examination of [Lamb]." Defense counsel stated that he had asked the expert to consider the alcohol-blackout issue for the first time the previous evening. Counsel explained that it had occurred to him that such testimony might be necessary if Lamb were to testify that he could not remember the events surrounding the charged offenses.

The prosecutor reiterated his request that the defense not be allowed to present expert testimony based on the expert's contact with Lamb, because the prosecutor had not received any discovery pertaining to such contact. The court agreed to allow the parties to consider the matter overnight and to resume discussion of the issue the following day.

In court the next day, the prosecutor clarified that he had no objection to Lamb offering expert testimony regarding alcohol induced blackouts, in general. However, the prosecutor stated that he objected to the expert offering any opinion concerning Lamb, specifically, because the prosecutor had not received any discovery pertaining to the basis of such an opinion.

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<sup>2</sup> It appears defense counsel was referring to the doctor who treated Lamb on May 11, 2004.

Defense counsel responded by saying that he was "substantially in agreement" with the prosecutor, and that "to the extent that [the expert] had examined [Lamb] before with respect to . . . other mental issues, I don't want to bring that in." However, defense counsel said that he had provided the expert with the May 2004 medical records, "which particularly apply to this case."

The court ruled that the defense expert would be allowed to testify regarding the parameters of alcohol-blackout syndrome, including whether the syndrome affects a person's memory and level of consciousness. With respect to whether the expert would be permitted to rely on the proffered medical records, the court stated that the medical records did not provide a sufficient basis for the expert to form any relevant opinion. The court also noted that Lamb could testify regarding his use of alcohol.

In response, defense counsel reviewed the contents of the medical records and stated, "[The expert] has those two records. She [has] looked at them. I guess it'll still be up to the court whether she'll be allowed to use that in her opinion of whether [Lamb] is an alcoholic, . . . whether or not he formed the intent, and whether or not at those levels he would be subject to alcoholic blackout."

The prosecutor reiterated both his hearsay objection to the expert's referring to the medical reports, as well his objection to the expert providing testimony concerning Lamb's alcoholism, based on the expert's prior contact with Lamb. The prosecutor requested that the court limit the expert's testimony to "her definition of what alcohol-induced blackout is." The court ruled:



"I'm inclined to agree with the People that the expert's testimony is limited to the syndrome . . . [and] what the definition and parameters are related to alcoholism or blackout syndrome . . . . [¶] It does not appear to the court that the records are sufficient to allow this expert to form an opinion. We've got records at best maybe two instances within a 20-day period where he went to the hospital under the influence of alcohol. I don't think that's sufficient for an expert to find that he's an alcoholic, and that if he were .28 or anything else that he would be one who has the syndrome. [¶] I think she can define it. He can testify that he's an alcoholic himself. I'll allow the jury to use it with the limited purpose of determining whether or not he had the required mental state."

b. *Trial evidence pertaining to Lamb's claim of voluntary intoxication*

Packer testified that he saw Lamb attempting to break into Knight's condominium.<sup>3</sup> According to Packer, Lamb was banging on the door of Knight's condominium in a steady and forceful fashion. Lamb did not appear to have an unsteady gait, and was not stumbling.

Several witnesses testified that Lamb did not appear to be intoxicated immediately after the burglary of Knight's condominium. Security guard Obermuller testified that she saw Lamb leaving Knight's apartment. When Obermuller identified herself as a security guard, Lamb responded, "Oh, I'm in trouble." Obermuller stated that Lamb did not display any symptoms that indicated to her that he had been drinking. Obermuller testified that Lamb did not stumble or slur his speech, and that he did not smell of

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<sup>3</sup> Packer was not able to positively identify Lamb at trial. However, on the day of the incident, Packer identified Lamb to police as the person he saw attempting to break into Knight's condominium.

alcohol. During cross-examination, defense counsel asked Obermuller whether Lamb appeared to be "disoriented." Obermuller responded in the negative.

San Diego Police Officer Yesenia Quintos testified that she had both training and experience in identifying people who are under the influence of alcohol or drugs. Officer Quintos testified that Lamb did not display any symptoms of intoxication while she was placing him under arrest, shortly after he came out of the condominium. Lamb did not smell of alcohol, did not have an unsteady gait, and was not slurring his speech. Lamb was able to respond to Officer Quintos's statements. In addition, Officer Quintos stated that Lamb explained to her that he had gone into Knight's residence in an attempt to escape from two people who had stabbed him. Defense counsel asked Officer Quintos several questions about her testimony, on direct examination, that Lamb did not appear intoxicated at the time of his arrest. During this cross-examination, Officer Quintos acknowledged that she had not performed any field sobriety tests on Lamb.

Officer Cory Mapston, who assisted in arresting Lamb after the burglary of Knight's condominium, also stated that he had not observed any symptoms that indicated to him that Lamb was under the influence of alcohol or drugs. On cross-examination, defense counsel asked Officer Mapston whether he had observed any signs that indicated that Lamb was under the influence of "anything." Officer Mapston responded in the negative.

Lamb testified that during the time period prior to the charged offenses, he was drinking large amounts of alcohol on nearly an around the clock basis. Lamb stated that he ordinarily would consume both a fifth of vodka and a pint of vodka before 10:00 a.m.,

and that he was unable to function without ingesting large amounts of alcohol. Lamb further testified that he did not recall committing either of the charged offenses. He explained that he remembered "very little," of the time period during which the charged offenses occurred.

Dr. Meyers testified that alcohol-blackout syndrome is "amnesia as the result of the rapid intake of alcohol." The syndrome is associated with "a quickly rising blood alcohol level and it interferes with the mind's ability to store short-term memories into long-term memories." Dr. Meyers explained that while a person who suffers from the syndrome can engage in "purposeful behavior[,] . . . they don't remember doing it. . . ."

## 2. *Governing law*

" 'The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense. . . .' [Citation.]" (*People v. Woods* (2004) 120 Cal.App.4th 929, 936.) However, "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) Among those rules of evidence are rules that preclude an expert from testifying about a subject matter for which the expert lacks an adequate foundation. (*People v. Cornwell, supra*, 37 Cal.4th at p. 83.) "[An] expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist

the trier of fact to evaluate the issues it must decide?' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.)

Even erroneous limitations placed on a defendant's right to present evidence generally do not constitute a deprivation of a defendant's constitutional right to present a defense:

" 'Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] [Citations.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 428 (*Boyette*).)

### 3. *Application*

We consider first Lamb's claim that the trial court erred in precluding Dr. Meyers from relying on "[Lamb's] statements during an earlier evaluation." In the trial court, defense counsel twice stated that he did not intend to present testimony concerning Dr. Meyer's evaluation of Lamb, and never requested that the court allow such testimony. Lamb thus cannot prevail on any claim pertaining to the trial court's alleged exclusion of statements Lamb made during this evaluation. (See Evid. Code, § 354, subd. (a) [judgment generally may not be reversed for exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"].)

Lamb also claims that the trial court erred in precluding Dr. Meyers from basing her opinion on "[Lamb's] testimony and facts and evidence adduced in the case." We

assume for the sake of argument that Lamb requested that Dr. Meyers be allowed to base her opinion on this evidence, and that the trial court's order precluded her from doing so. The trial court could have reasonably concluded that allowing Dr. Meyers to testify that Lamb was an alcoholic, or that he was prone to alcohol-induced blackouts, based on Lamb's trial testimony, would essentially allow Lamb to present this testimony twice. The trial court did not abuse its discretion in determining that such testimony would not assist the trier of fact in evaluating the issues of the case. (See *People v. Richardson*, *supra*, 43 Cal.4th at p. 1008.)

With respect to Lamb's contention that the trial court erred in precluding Dr. Meyers from testifying as to Lamb's alcoholism or his susceptibility to alcohol-induced blackouts, based on the two medical reports, one report indicated merely that Lamb smelled of alcohol, and the second report revealed an elevated blood alcohol level. Neither report establishes that Lamb is an alcoholic or demonstrates that Lamb exhibited any of the symptoms of alcohol-induced blackouts. The trial court thus did not abuse its discretion in concluding that the two medical reports did not provide a sufficient foundation for an expert opinion on either subject. (See *People v. Cornwell*, *supra*, 37 Cal.4th at p. 83.)

To the extent that Lamb intends to claim that the trial court erred in precluding Dr. Meyers from referring to the medical records in her testimony, we reject this argument. (See *People v. Catlin* (2001) 26 Cal.4th 81, 137 ["[I]t generally is not appropriate for the testifying expert to recount the details of the other physician's report or expression of opinion"].) Further, while an expert may base her opinion on inadmissible materials or

information, that does not render those materials, themselves, independently admissible for their truth. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.)

In view of our conclusion that the trial court did not abuse its discretion in limiting the expert's testimony, it necessarily follows that the court did not violate Lamb's constitutional right to present a defense. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 685.) Further, even assuming, strictly for the sake of argument, that the court erred in excluding any of the evidence, such error did not deprive Lamb of his constitutional right to present a defense. Lamb was allowed to present the defense of voluntary intoxication and did so, both through his own testimony and through Dr. Meyers's testimony, as well as through cross-examination of the People's witnesses. The trial court did not "completely exclud[e] evidence of [his] defense." (*Boyette, supra*, 29 Cal.4th at p. 428.)<sup>4</sup>

C. *It is not reasonably likely that the trial court's instruction regarding voluntary intoxication misled the jury*

Lamb claims that the trial court erred in instructing the jury that "Voluntary intoxication is not a defense to [r]esidential [b]urglary." Lamb argues that evidence of his voluntary intoxication was relevant to the specific intent element of the burglary offenses, and that this instruction deprived him of his constitutional right to present a defense.

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<sup>4</sup> In light of our conclusion, we need not consider whether we can affirm the trial court's ruling on the ground that the defense failed to provide the prosecutor with adequate discovery regarding the proffered expert testimony.

We apply the de novo standard of review to Lamb's claim. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

1. *Factual and procedural background*

The parties presented evidence to the jury relevant to Lamb's claim of voluntary intoxication, as outlined in part III.B.1.b., *ante*.

At a jury instruction conference that the trial court held with counsel, outside the presence of the jury, defense counsel requested that the court instruct the jury regarding voluntary intoxication and the issue of specific intent. The court then read to counsel a portion of CALCRIM No. 3426 concerning voluntary intoxication. After the prosecutor said that he did not object to the court giving that instruction, the court stated, "[T]here are several areas where I'll put in the term residential burglary and delete the appropriate paragraphs."

After the court informed counsel that the court would also instruct the jury pursuant to CALCRIM No. 303, regarding evidence received for a limited purpose, the following colloquy occurred:

"The Court: This instruction [the voluntary intoxication instruction] is for a limited purpose on the issue of intent. It is not a defense to the crime of residential burglary.

"[Defense counsel]: Right.

"The Court: So I have to give the [CALCRIM No.] 303 instruction . . . ."

The court instructed the jury regarding voluntary intoxication pursuant to a modified version of CALCRIM No. 3426, as follows:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the specific intent to do the act required.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"In connection with the charge of residential burglary, the People have the burden of proving beyond a reasonable doubt that the defendant acted with specific intent. If the People have not met this burden, you must find the defendant not guilty of residential burglary.

"You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to residential burglary."

The prosecutor began his closing argument by noting that Lamb had stated, "Oh I'm in trouble," upon being discovered leaving Knight's condominium. The prosecutor told the jury that it must consider whether this was the statement of a person who "knows what he's doing . . . or is a person who's so drunk out of their mind that they don't know what they're doing . . . . That is what you have to decide." The prosecutor then reviewed the evidence that tended to demonstrate that Lamb entered both residences with the requisite specific intent. In reviewing the evidence, the prosecutor repeatedly told the jury that it must consider whether such evidence was evidence "of someone who's under the influence [such] that they don't know what they are doing."

Defense counsel also focused on Lamb's intoxication during his closing argument. Defense counsel noted that during the period in which the charged offenses occurred, Lamb had been drinking heavily, and that Lamb had no recollection of having committed



either offense. Defense counsel further noted that some of the circumstances of the charged offenses — particularly Lamb's lack of sophistication in perpetrating the alleged offenses — suggested that Lamb lacked the requisite specific intent, as a result of being intoxicated. Defense counsel specifically addressed the trial court's voluntary intoxication jury instruction, stating, "It [is] not a defense to burglary per se; [b]ut it effects [sic] one of the elements. If you're under the influence, even voluntarily of some substance, alcohol, it can affect your ability to form that intent when you enter, so you have to consider that."

2. *Governing law*

- a. *Evidence of voluntary intoxication is admissible on the issue of whether a defendant formed the specific intent necessary to be convicted of a charged crime, but it is not a defense to such a crime*

Section 22 governs the admissibility of evidence of the voluntary intoxication of the defendant in a criminal case:

"(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

"(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

"(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance."

It is thus well established that "voluntary intoxication [can] only negate specific intent and not general criminal intent." (*People v. Williams* (2001) 26 Cal.4th 779, 789.) Burglary is a specific intent crime. (*In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1363 [The crime of burglary involves 'the act of unlawful entry accompanied by the specific intent to commit grand or petit larceny or any felony'"].) Evidence of voluntary intoxication is therefore admissible on the issue of whether a defendant had the requisite specific intent to commit a burglary. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 341.)

Voluntary intoxication is commonly referred to as a defense to specific intent crimes. (See, e.g., *People v. Medina* (2007) 41 Cal.4th 685, 691 ["To support a defense of voluntary intoxication, defendant presented an expert witness"].) "Technically, however, it [h]as never [been] a defense." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Further, the Legislature's "withdrawal of diminished capacity as a defense removes intoxication from the realm of defenses to crimes. Intoxication is now relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state." (*Ibid.*) While a trial court has a sua sponte duty to instruct on all defenses that are consistent with a defendant's theory of the case and that are supported by substantial evidence, a voluntary intoxication instruction is akin to a pinpoint instruction to which a defendant is entitled, if at all, only upon request. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 670.) In sum, "voluntary intoxication . . . is not a defense to crime as such, though it may be relevant to whether the defendant formed a specific intent necessary for its commission." (*People v. Boyer* (2006) 38 Cal.4th 412, 469.)

b. *CALCRIM No. 3426*

CALCRIM No. 3426 is a standard jury instruction concerning the purpose or purposes for which a jury may consider evidence of a defendant's voluntary intoxication. CALCRIM No. 3426 contains the following sentence, "[Voluntary intoxication is not a defense to <insert general intent offense[s]>]." The Bench Notes to the instruction explain the proper use of this bracketed sentence by stating, "If both specific and general intent crimes are charged, the court must specify the general intent crimes in the bracketed portion of the last sentence and instruct the jury that voluntary intoxication is not a defense to those crimes." The Bench Notes to CALCRIM No. 3426 also state, "Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's required mental state."

c. *Law governing the interpretation of jury instructions*

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.] [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

"The reviewing court . . . must consider the arguments of counsel in assessing the probable impact of the instruction on the jury. (See *People v. Garceau* (1993) 6 Cal.4th 140, 189 [any possibility of confusion about conspiracy instruction was diminished by the parties' closing arguments], disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191 [correct view of the law regarding mitigating factors in penalty phase trial was reinforced by the parties' closing arguments'] [Citation.]") (*People v. Stone* (2008) 160 Cal.App.4th 323, 331.) The evidence presented at trial may also be considered in determining whether an instruction was reasonably likely to be misleading. (See *People v. Hughes, supra*, 27 Cal.4th at p. 341.)

d. *Case law addressing whether a trial court erred in instructing the jury regarding voluntary intoxication*

Where a defendant claims that instructional error precluded the jury from properly considering evidence of a defendant's voluntary intoxication, "[t]he appellate court should review the instructions as a whole to determine whether it is 'reasonably likely the jury misconstrued the instructions as precluding it from considering' the intoxication evidence . . . . [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.)

In *People v. Castillo* (1997) 16 Cal.4th 1009, 1014, the defendant claimed that his counsel was ineffective in failing to request that the trial court specifically instruct the jury that it could consider evidence of the his voluntary intoxication in determining whether he premeditated a killing. The Supreme Court rejected this claim, reasoning in part:

"The court's instructions did not hinder defense counsel from arguing that defendant's intoxication affected all the necessary mental states, including premeditation. Counsel argued that defendant's behavior was 'the very type of thing that you could readily expect from someone who was under the influence,' and that 'From all the evidence this simply does not appear that premeditated, deliberate type of homicide at all.' He stressed, 'We have a case where the defendant had taken a drug, PCP, taken it for the first time.' Counsel tied the intoxication evidence to the issue of premeditation and deliberation, even calling the jury's attention to the instructions . . . ." (*Id.* at p. 1017.)

Similarly, in *People v. Hughes, supra*, 27 Cal.4th at page 341, the Supreme Court rejected a defendant's claim that the trial court erred in instructing the jury pursuant to CALJIC No. 4.20 that "no act is made less criminal by reason of voluntary intoxication," in a case in which the defendant was charged with crimes for which voluntary intoxication was inadmissible, as well as crimes for which voluntary intoxication was admissible. The Supreme Court assumed for the sake of argument that the challenged portion of CALJIC No. 4.20 "was potentially misleading in light of the murder, robbery, and burglary charges." (*People v. Hughes, supra*, 27 Cal.4th at p. 341.) Nevertheless, the court reasoned that there was not a reasonable likelihood that the jury had been misled by the instruction, in view of the following circumstances:

"[W]e cannot agree with defendant that the potentially misleading instruction posed a substantial risk of actually misleading the jury into believing that defendant's voluntary intoxication evidence — essentially, the centerpiece of his defense — was irrelevant to, and could not be considered with regard to, his culpability for the offenses of murder, robbery, and burglary. As the People observe, the closing arguments of the defense and of the prosecution emphasized, implicitly and explicitly, the correct interpretation of both instructions, namely that CALJIC No. 4.20's admonition applied only to count IV, sodomy, whereas under CALJIC No. 4.21, the jury *could* consider the effect of voluntary intoxication on

defendant's specific intent to commit the crimes charged in counts I - III — murder, robbery, and burglary. Viewing together the instructions, counsel's legally correct arguments, and the evidence presented to the jury for its consideration, we do not believe that it is reasonably 'likely the jury was "misled to defendant's prejudice" ' or that the jury would have understood CALJIC No. 4.20 to operate in the manner asserted by defendant, essentially precluding consideration of his primary defense. [Citation.]" (*People v. Hughes, supra*, 27 Cal.4th at pp. 341-342.)

### 3. *Application*

Lamb claims that the trial court erred in improperly modifying the final sentence of CALCRIM No. 3426 to state, "Voluntary intoxication is not a defense to residential burglary," arguing that residential burglary is a specific intent crime, and this portion of the instruction pertains to general intent crimes only.

It appears highly likely that the trial court failed to accurately read the Bench Notes to CALCRIM No. 3426, which states that the court should give a version of the challenged sentence to the jury only in cases in which the defendant is charged with *both* specific and general intent crimes, in order to specify that voluntary intoxication is not a defense to the *general* intent crimes. In this case, Lamb was not charged with any general intent crimes. However, the trial court's instruction was technically legally correct, even as to the charged specific intent crime of residential burglary. Voluntary intoxication is not a defense to any crime — even one that requires proof of a defendant's specific intent. (*People v. Boyer, supra*, 38 Cal.4th at p. 469.) Further, the remainder of the instruction properly informed the jury that it could consider Lamb's voluntary intoxication for the purpose of determining whether he harbored the requisite specific intent. (*Ibid.*)

Under the circumstances of this case, there is no reasonable likelihood that the jury interpreted the challenged sentence as "canceling the part of the instruction that permitted consideration of voluntary intoxication," as Lamb suggests. The primary focus of the trial was whether Lamb was intoxicated to the extent that he lacked the requisite intent to commit the two burglaries. Several witnesses who saw Lamb at around the time of his arrests were asked numerous questions about whether he appeared to be intoxicated. Further, Lamb presented his own testimony and that of Dr. Meyers, which focused heavily on intoxication.

During closing argument, the prosecutor repeatedly told the jury that it would have to determine whether or not Lamb was intoxicated such that he did not form the requisite intent. Defense counsel also focused heavily on the evidence of Lamb's intoxication. No one suggested to the jury that it could not consider evidence of Lamb's intoxication. The extensive quantity of evidence presented regarding voluntary intoxication, and counsels' arguments regarding that evidence, suggest that it was not reasonably likely that the jury understood the last sentence of the trial court's voluntary intoxication instruction to preclude the jury from considering such evidence. (See *People v. Castillo*, *supra*, 16 Cal.4th at p. 1017; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 341-342.)

In addition, "if the instructions were susceptible of the interpretation defendant now asserts, counsel likely would have objected at trial on this basis." (*People v. Young* (2005) 34 Cal.4th 1149, 1203.) However, during his closing argument, defense counsel not only failed to object to the instruction, but properly explained to the jury that although evidence of Lamb's voluntary intoxication was not a defense "per se" to

residential burglary, such evidence was relevant to the intent element of the charged offenses.

If the jury interpreted the court's instruction to preclude its consideration of the evidence of Lamb's voluntary intoxication, the jury would have had to disregard the remainder of the instruction, which informed the jury that it could consider evidence of Lamb's voluntary intoxication in determining whether he had the requisite intent. This further strengthens the conclusion that the jury was not misled by the instruction. (See *People v. Ramos, supra*, 163 Cal.App.4th at p. 1088 [correctness of jury instructions are assessed as a whole.]) The fact that the jury did not ask any questions of the court indicating confusion with the court's voluntary intoxication instruction provides additional support for the conclusion that there is no reasonable likelihood that the jury was misled. (*People v. Young, supra*, 34 Cal.4th at p. 1203 [rejecting claim that there was a reasonable likelihood that jury was misled by court's instructions and noting "record contains no inquiries from the jury regarding the application of these instructions"].)

Accordingly, we conclude that it is not reasonably likely that the trial court's instruction regarding voluntary intoxication misled the jury.<sup>5</sup>

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<sup>5</sup> In light of our conclusion, we need not consider the People's arguments that Lamb forfeited his claim by failing to object to the trial court's instruction at trial, and that any instructional error was harmless.



IV.  
DISPOSITION

The judgment is affirmed.

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AARON, J.

WE CONCUR:

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HALLER, Acting P. J.

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O'ROURKE, J.